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IN THE

Supreme Court of the United States

No. 387

JIMMIE R. EVANS, ET AL.,
Petitioners,

versus

IVAN ALLEN, JR., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 18, 1968.

OPINIONS BELOW

The opinion of the Trial Judge dated June 7, 1967 is not officially reported, but is reprinted as Appendix "A" hereof. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Trial Court's judgment is not yet officially reported but is reprinted as Appendix "B" hereof.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3). There is no Motion For Rehearing pending in said Court.

ISSUES PRESENTED

(1) Were Petitioners accorded due process in the course of hearings culminating in discharge?

(2) Can a governmental body possessing the right to discharge employees do so without regard to the procedure for discharge set forth in the charter of the governing body?

(3) Was notice of the hearings properly given to appellants?

(4) Did the governing body rely upon credible testimony?

STATUTES INVOLVED

1.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"Indictment, punishment, etc. No person shall be held to answer for a capital, or other-

wise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3.

Title 28, Section 1343, U.S.C.A.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

'(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

'(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.'

4.

Title 42, Section 1983, U.S.C.A., Civil Action For Deprivation of Rights:

'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.'

STATEMENT OF THE CASE

Each of Appellants was employed by the Atlanta Fire Department for more than one year prior to September 1, 1966. (R-190) Each of them was a member of the Atlanta Firefighters Union, Independent and did not appear for work at the Atlanta Fire Department on September 3, 4, or 5, 1966 on account of a dispute over wages, hours and working conditions. This labor dispute was widely publicized by the various news media in the Atlanta, Georgia area. (R-70-79)

On or about September 7, 1966 each Appellant was suspended by action of these defendants, who constitute the Mayor and Board of Firemasters of the City of Atlanta. (R-304, 305) Thereafter each Appellant was discharged in ex parte hearings conducted by defendants on September 19, 20, 21, 22, 23, 1966 and October 4, 1966. (R-90-257) Appellants were discharged based upon the following accusation:

"I.

You have violated Rule 3 of Section 2 of said Rules and Regulations which reads as follows:

"Members shall not disobey or fail to obey any order or command of a superior officer."

In that you have failed and refused to obey a lawful order of the Chief of the Atlanta Fire Department issued September 3, 1966, requiring all members of the department to return to their assigned stations at the next regular tour of duty.

II.

You have violated Rule 8 of Section 2 of said Rules and Regulations which reads as follows:

"Members shall not neglect or shirk any duty."

In that you have neglected your assigned duties in the Atlanta Fire Department by failing to appear at your regularly assigned duty station at your assigned hours.

III.

You have violated Rule 9 of Section 2 of said Rules and Regulations which reads as follows:

"Members shall not absent themselves from quarters, fire or other duty without

permission of the Company Commander; absent themselves from the City without notifying their Company Commander."

In that you have absented yourself from your station duty without permission of the Company Commander or without any authorization from the superior officers of the department.

IV.

You have violated Rule 6 of Section 2 of said Rules and Regulations which reads as follows:

"Members shall not commit any act for which they may be imprisoned or arrested, whether on or off duty, in uniform or otherwise."

In that you have failed to obey and comply with a valid court order issued by the Superior Court of Fulton County on September 3, 1966; thereby subjecting yourself to possible contempt citation by said court and imprisonment or arrest." (R-90-257)

The aforesaid Rules and Regulations of the Atlanta Fire Department were allegedly adopted by the Board of Firemasters on May 26, 1958.

With reference to the Board of Firemasters' authority to establish rules and regulations, the Charter of the City of Atlanta specifically provides: (R-33)

"Sec. 10.2.1. Authority to establish rules and regulations.

The Mayor and board of aldermen are given full, complete and unqualified authority to establish, and shall establish, for the department of fire, civil service rules and regulations, to the end that officers, members and employees shall serve during good behavior and efficient service, and to be promoted according to efficient service, and length of time employed in said department, all of which is to be judged of by said mayor and board of aldermen or the committee exercising its authority as aforesaid." Section 10.2.1. of the Charter of the City of Atlanta (Acts 1951, page 3026; Charter 1953, Section 10.10). (emphasis supplied)

Service of notice of the charges or accusation against these Appellants was not made in accordance with Section 19.14.3 (Section 12-34, Sub-Section [d]) of the Atlanta Municipal Code which provides as follows: (R-68)

"(d) SERVICE OF NOTICES. Service of all notices provided for herein may be had upon any accused member in person, by the chief or any member of the department designated by the chief, or by leaving a copy of the charges or accusation of the accused at his most notorious place of abode." (R-24)

Appellants show that no notice was given any of them in person by the chief or any member of the department designated by the chief, or by leaving a copy of the charges or accusation against them at their most notorious place of abode. (R-24) No appellant appeared in person or by counsel at any of the hearings held by the Board of Firemasters on September 19, 20, 21, 22, or 23, 1966 or October 4, 1966, which resulted in their discharge. (R-90-257)

The alleged evidence upon which the defendants attempt to justify their discharge of appellants is found at pages 90 through 257 of the printed record filed in this case. For purposes of brevity, a representative case will be selected for discussion, since all were substantially the same and pertinent provisions of these proceedings which apply to this case and the others will be referred to hereinafter. The case of *James I. Martin,* one of the appellants herein begins at page 101 of the printed record and is as follows:

"BY THE BAILIFF:

J. I. Martin. Mr. Chairman, I have called Mr. J. I. Martin thrice, and he does not answer and he is not on the premises.

BY THE CHAIRMAN:

State the charges, Mr. Secretary.

BY THE SECRETARY:

Mr. Martin is charged with violating the rules and regulations of the Atlanta Fire De-

partment, Part II, Article 8, Section 2. Members shall not:

3. Disobey or fail to obey any order or command of a superior officer.

6. Commit any act for which they may be imprisoned or arrested, whether on or off duty, in uniform or otherwise.

8. Neglect or shirk any duty.

9. Absent themselves from quarters, fire or other duty, without permission of the Company Commander; absent themselves from the city without notifying their Company Commander.

BY THE CHAIRMAN:

Will you state the evidence in this case, Chief.

BY THE CHIEF:

Mr. Chairman, Members of the Board of Fire Masters, a copy of these charges together with a citation and instructions that this would be heard at fire headquarters on September 19, at 10:00 a.m., was placed in an envelope, with his name and address on the front, with sufficient postage on the front of this envelope, and placed in the United States Post Office, certified mail, signed receipt requested.

Mr. Martin is in violation of Rule 3, in that he failed and refused to obey a lawful order of the Chief of the Atlanta Fire Department issued September 3, 1966, requiring all members of the department to return to their assigned stations at the next regular tour of duty. Mr. J. I. Martin's next regular assigned schedule was 8:00 a.m., Sunday, September 4, 1966. He did not return to his station and is therefore in violation of this rule.

Mr. J. I. Martin is in violation of Rule No. 8, in that he neglected his assigned duties in the Atlanta Fire Department by failing to appear at his regular assigned duty station at the assigned hours. His regular duty station was fire station No. 26, and Mr. Martin failed to report at his regular assigned hours on 9/3/66 at 8:00 a.m. and is therefore in violation of this rule.

Mr. J. I. Martin is in violation of Rule [49] 9, in that he absented himself from his station duty without permission of the Company Commander or without any authorization from the superior officers of the department. Inasmuch as he has not returned to Fire Station No. 26 at this hour, he is in continued violation of this rule.

Mr. J. I. Martin is in violation of Rule 6, in that he failed to obey and comply with a valid court order issued by the Superior Court of Fulton County on September 3, 1966, thereby

subjecting himself to a possible contempt citation by said court and imprisonment or arrest. And therefore is in violation of this rule.

Inasmuch as these are dismissible offenses, I find it my duty to recommend that Mr. Martin, J. I. Martin, be discharged.

BY THE CHAIRMAN:

You have heard the evidence and the recommendation of the Chief, is there any further discussion?

BY MR. TURNER:

Mr. Chairman, I move that the Chief's receipt of certified mail bearing signature which was sent to Mr. Martin and a copy of the letter, copy of the citation, be placed in the file and made a part of this record, then I move that he be found guilty on each and every one of these charges, and [50] that the Chief's recommendation and dismissible be followed."

It should be noted that no sworn testimony was presented in Mr. Martin's case or the cases of C. R. Hitchcock and G. B. Greer. (R-93-101) After Mr. Martin had been found guilty and dismissed from the service of the Atlanta Fire Department by Appellees, there was an effort to administer the oath to Mr. C. H. Hildebrand, Jr., Chief, Atlanta Fire Department, *on an ex post facto and prospective basis.* In this connection, the following occurred:

"BY THE CHAIRMAN:

Gentlemen, it has been brought to my attention by the city attorney that we should put the Chief under oath due to the extent of the evidence that has been submitted is the truth at this time. If you will raise your right hand: Chief, do you swear that the testimony that you have given in the trial of these cases heretofore, up to this time, and in the future, shall be the truth, the whole truth and nothing but the truth, so help you God?

BY CHIEF HILDEBRAND:

The truth to the best of my knowledge and as reported by the superior officers of this department to this office, and set out in the record.

BY MR. TURNER:

And these records are kept under your supervision and direction at all times?

BY CHIEF HILDEBRAND:

Yes, sir."

On September 28, 1966 Appellants filed with the City of Atlanta and its Board of Firemasters, a Motion to Vacate and Set Aside their Suspension and Discharge. Copy of said Motion is attached to the original complaint as "Exhibit B" and appears beginning at Page 26 of the record in this case. This Motion to Vacate and Set Aside was authorized by Section 12-34 of the Ordinances of the City of Atlanta, which appears begin-

ning at Page 22 of the record. This Ordinance provides in substance that any person discharged, may within ten days, file with the Board of Firemasters a written demand for an investigation, whereupon such Board *shall* conduct an investigation. The investigation shall be confined to a determination of the question of whether such discharge was or was not made for political, personal or religious reasons and *was or was not made in good faith for cause.* After such investigation, the Board of Firemasters may, if it finds the discharge was not made in good faith for cause, order the immediate reinstatement or re-employment of such convicted person. The aforedescribed Motion to Vacate and Set Aside was based upon the following written reasons and contentions:

"1.

Service of notice of the charges or accusation against these movants was not made in accordance with Section 19.14.3 (Section 12-34, Sub-Section (d)) of the Atlanta Municipal Code which provides as follows:

'(d) *Service of Notices.* Service of all notices provided for herein may be had upon any accused member in person, by the chief or any member of the department designated by the chief, or by leaving a copy of the charges or accusation of the accused at his most notorious place of abode.'

Movants show that no notice was given any of them in person by the chief or any members of the department designated by the chief, or by leaving a copy of the charges or accusation against them at their most notorious place of abode. The suspension and discharge of these Appellants without service being perfected upon them of a copy of the charges or accusation against them prior to their being suspended or discharged is thus null and void.

2.

Movants show that the accusation against them was based on an alleged violation of the following rules and regulations of the Atlanta Fire Department, to-wit:

Rule 3, Section 2. "Members shall not disobey or fail to obey any order or command of his superior officer."

Rule 6, Section 2. "Members shall not commit any act for which they may be imprisoned or arrested whether on or off duty, in uniform or otherwise."

Rule 8, Section 2. "Members shall not neglect or shirk any duty."

Rule 9, Section 2. "Members shall not absent themselves from quarters, fire or other duty without permission of the company

commander. Absent themselves from the City without notifying their company commander."

Movants show that the foregoing rules were not in existence at the time the acts complained of occurred, at the time the charges against them were prepared and filed, or at the time movants were tried, suspended or discharged for an alleged failure to obey said non-existent rules.

The aforesaid rules have no legal existence because they were purportedly adopted by the Board of Firemasters on May 26, 1958. Section 10.2.1 of the Charter of the City of Atlanta (Acts 1951, page 3026; Charter 1953, Section 10.10) specifically provides:

'Sec. 10.2.1. Authority to establish rules and regulations.

The mayor and board of aldermen are given full, complete and unqualified authority to establish, and shall establish, for the department of fire, civil service rules and regulations, to the end that officers, members and employees shall serve during good behavior and efficient service, and to be promoted according to efficient service, and length of time employed in said department, all of which is to be judged of by said mayor and board

of aldermen or the committee exercising its authority as aforesaid.'

Movants therefore show that there being no valid rules of the Atlanta Fire Department promulgated by the Mayor and Board of Aldermen as required by the Charter of the City of Atlanta that no legal suspension or discharge can be based upon their alleged violation.

3.

Section numbered four of the charges against movants is based upon the alleged failure to obey and comply with the valid court order issued by the Superior Court of Fulton County on September 3, 1966 thereby allegedly subjecting movants to possible contempt citation by said Court and imprisonment or arrest. Movants show that the foregoing allegation against them is not sufficient upon which to justify in whole or in part the suspension or discharge of any fireman for the following reasons:

(a) Said allegation is too vague, indefinite and uncertain in that it fails to apprise movants how, when and where they failed to obey and comply with the valid court order and subjected themselves to possible contempt citation, imprisonment or arrest.

(b) Said allegation is a mere conclusion of C. H. Hildebrand, Jr., Chief, Atlanta Fire De-

partment not supported by the facts alleged. C. H. Hildebrand, Jr. is not a licensed Georgia lawyer and his opinions as to violations of law are worthless.

(c) Neither the Board of Firemasters nor C. H. Hildrebrand, Jr., Chief, Atlanta Fire Department, has any authority or jurisdiction to determine whether any movant failed to obey and comply with the valid court order issued by the Superior Court of Fulton County on September 3, 1966 thereby subjecting themselves to possible contempt citation by said Court and imprisonment or arrest. Jurisdiction over these matters and things is vested by law, and the Constitution of this State exclusively in the Superior Court of Fulton County and the judges presiding therein.

(d) Movants show that as a matter of law and fact that neither they, any of them, nor the Atlanta Firefighters Union, Inc. has ever been served with any valid court order issued by the Superior Court of Fulton County on September 3, 1966 or thereafter for the following reasons:

(1) The petition in the subject case and the purported restraining order of Judge Luther Alverson was signed on September 3, 1966, served on J. I. Martin, individually and as President of Atlanta Firefighters Union, Incorporated, and J. C. Freck on

September 3, 1966 without process of any kind being affixed by the Clerk of the Superior Court of Fulton County, and at a time when it was a mere private paper, the same not being filed with the Clerk of said Court until September 9, 1966. Movants had already been suspended by September 7, 1966. As a matter of law, therefore, movants at no time were ever in violation of any order of the Fulton Superior Court since it never acquired jurisdiction over them or the subject matter of the City's petition until September 9, 1966 at a time when they were already under suspension by act of the City of Atlanta.

(2) No contempt citation has ever been filed or served upon any of these movants and, therefore, as a matter of law, there could be no possibility or probability of their subjecting themselves to possible contempt citation, imprisonment or arrest.

4.

Movants show further that no legal evidence was received by the Board of Firemasters prior to their action in suspending or discharging movants and that such evidence as was received was ex parte and not under oath. The trial of movants consists in the determination of factual issues and the application of legal

criteria to them — a judicial act — the fundamental requirements and due process were applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence. Thus it is not proper to admit ex parte evidence as given by witnesses not under oath and not subject to cross-examination by the opposing party. The deciding authority may not base its decision on evidence which has not been specifically brought before it; the findings must conform to the evidence adduced at the hearing.

The Board of Firemasters having suspended and discharged movants based on a trial in which nothing but ex parte evidence was received or upon evidence not specifically brought before it and its findings not conforming to the evidence adduced at the hearing, the same is therefore null, void and in plain and literal violation of movants' right of due process as guaranteed them in Article I, Section 1, Paragraph 3, Article I, Section 1, Paragraph 4, and Article I, Section 1, Paragraph 5 of the Constitution of the State of Georgia and the First, Fifth, Sixth and Fourteenth Amendments of the United States Constitution."

Notwithstanding the timely filing of said Motion pursuant to the aforesaid Ordinance of the City of Atlanta, these defendants made no investigation of the merits

thereof and summarily dismissed and ignored the same. (R-38-45)

In conducting the trials resulting in the discharge and suspension of Appellants herein complained of, the Board of Firemasters placed great weight upon that portion of the accusation against Appellants, which charged them with a violation of Rule 6 of the Atlanta Fire Department, in that they allegedly failed to obey and comply with a court order issued by the Superior Court of Fulton County, on September the 3rd, 1966, thereby subjecting themselves to possible contempt citation by said court and imprisonment or arrest. In this connection Mr. Cecil Turner, member of the Board of Firemasters made the following comment at the conclusion of all these cases, which appears at page 267 of the printed record in this case, as follows:

"BY MR. TURNER:

I would like for the record to show that we all have taken cognizance and are aware of the pending suit over in Fulton Superior Court against the individual firemen and that they are aware that they were under the order of the court, and that order has not been rescinded at the time they received the order. Am I right, Mr. Attorney?

MR. JENKINS:

That's my understanding."

It should be noted that there was not one scintilla of evidence that any Appellant had ever been cited, or

found guilty of any act of contempt or any other violation of any court order within the State of Georgia, which was material to this action. The record in this case shows that on September 3, 1966 an ex parte order was signed, in the case of *City of Atlanta v. Atlanta Firefighters Union*, requiring certain acts to be performed by the Union and its members. One of these acts was that Appellants report to their duty stations. Significantly, however, the petition and ex parte order was served upon the Union at a time when *no* process was affixed thereto, and was not filed until September 9, 1967, at a time when Appellants had already been suspended from their jobs by the Board of Firemasters. This suit for injunction was dismissed on Motion of the City of Atlanta on September 13, 1966 and the order referred to was not even in existence at the time Appellants were tried before the Board of Firemasters. That the action had been dismissed and no contempt citations had been filed was well known to the Board of Firemasters since its own attorney had signed and procured the dismissal. (R-289)

Mr. William T. Knight, Chairman of the Board of Firemasters, after some vacillation, testified as to the weight given this contempt of court accusation beginning at Page 57 of the printed record in this case, in part, as follows:

> "Q Now, you testified, I believe, earlier that the penalty of discharge was discussed and I assume imposed because, among other things, that the Plaintiff Firemen, that is, had failed to obey and comply with a valid court order is-

sued by the Superior Court of Fulton County, on September [9] the 3rd, 1966, thereby subjecting himself to possible contempt citation by said court and imprisonment or arrest.

You found them guilty of that charge, did you not as conveyed in Section IV, or Paragraph IV, of the Charges and Accusations filed against the Plaintiff Firemen.

A Yes. In there I think, also, the Charges were more than one.

Q Sir, there were four charges, were there not against the Firemen?

A That's right.

Q And you found them guilty of all four.

A Yes.

Q And, because they were guilty of all four, in your opinion and according to the others, you voted to impose the penalty of discharge. Is that correct?

A Yes.

Q And, if they had been guilty of some charges and not guilty of others, that may have made a difference as to whether to discharge them or not. Is that true?

A Yes, there was a motion made on each one of them, that he be found guilty, as charged, and the motion was that he be dismissed from the department.

Q My question is, if they had been guilty of some charges and not guilty of others, your penalty or your finding might have been different. Is that true?

[10] A I think he was guilty of his charge.

Q If the evidence had been before you.

A There was no evidence before me.

Q Well, let's assume that the evidence showed they were guilty of some charges and not guilty of others, your opinion might have been different on the penalty imposed. Would it not?

A We had one Fireman to answer the Charges and when he appeared and we tried him and we put him back to work.

Q Then, you agree that if the evidence had been submitted and they were guilty of some charges and not guilty of others, the penalty might have been different, in the first place, and the findings might have been different in the second place. Is that correct?

A Yes, I think so. I think it's only fair to give a man a hearing; we tried to give them a hearing and we couldn't get them over here."

Q. V. Williamson, member, Board of Firemasters, testified by deposition in part beginning at Page 275 of the printed record in this case as to the great weight he placed upon this alleged contempt accusation, as follows:

"Q Now, I believe the charge, you say, you read it, says that the Firemen violated Rule 6 of Section 2 of said Rules and Regulations which reads as follows:

'Members shall not commit any act for which they may be imprisoned or arrested, whether on or off duty, in uniform or otherwise.

In that you have failed to obey and comply with a valid court order issued by the Superior Court of Fulton County on September 3, 1966; thereby subjecting yourself to possible contempt citation by said court and imprisonment or arrest.'

That was one of the rules that you found them guilty of violating. Is that correct?

A That's correct.

Q Now, do you recall any evidence being submitted to you, or to the Board, in your presence, in which any Fireman had been cited for contempt by any court?

A Yes, the City Attorney stated that an injunction had been issued against these firemen, ordering them [11] back to work and they had violated this court order.

Q And, you are basing your finding of guilt, as to that particular charge, on the opinion of the City Attorney?

A Yes, because there was nobody else who said any different and I asked if anybody had any evidence contrary to the evidence we had before us.

Q And, that was all of the evidence you had on that particular offense. Is that correct?

A Yes.

Q Now, if evidence had been submitted that the firemen cited to appear before the Board of Firemasters were not guilty of violating that rule, that would have made some difference, would it not, in your final findings as to their

guilt or innocence of that charge and the penalty imposed.

A I would have looked at the evidence had it been before me, but there was none before me.

Q It might have been different if there had been evidence to the contrary. Is that right?

A It might have, it could have."

Thereafter on the 9th day of January, 1967 Appellants filed a complaint in the United States District Court, Northern District of Georgia, Atlanta division, which alleged substantially as follows:

"1.

Defendant IVAN ALLEN, JR. is the Mayor of the City of Atlanta. W. T. KNIGHT, Q. V. WILLIAMSON, CECIL TURNER and JACK SUMMERS are Aldermen of the City of Atlanta and comprise the Board of Firemasters of said City. C. H. HILDEBRAND, JR. is Chief of the Atlanta Fire Department. All of said defendants occupied said official positions with the City of Atlanta at all times material to this cause of action.

2.

Each of said defendants is a resident of either Dekalb or Fulton County, Georgia.

3.

Jurisdiction of this action is conferred upon this Court by virtue of Title 28, Section 1343, U.S.C.A., which provides in part as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

'(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

'(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.'

Title 42, Section 1983, U.S.C.A., Civil Action For Deprivation of Rights:

'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.'

4.

Each plaintiff has been in the employ of the City of Atlanta and its Fire Department for more than one (1) year prior to September 1, 1966.

5.

On or about September 7, 1966, each of plaintiffs was discharged by act of defendants. Said discharge was based upon an accusation that each of plaintiffs had allegedly violated the following rules and regulations of the Atlanta Fire Department, to-wit:

"Rule 3, Section 2. 'Members shall not disobey or fail to obey any order or command of his superior officer.' "

"Rule 6, Section 2. 'Members shall not commit any act for which they may be imprisoned or arrested whether on or off duty, in uniform or otherwise.' "

"Rule 8, Section 2. 'Members shall not neglect or shirk any duty.' "

"Rule 9, Section 2. 'Members shall not absent themselves from quarters, fire or other duty without permission of the company commander. Absent themselves from the City without notifying their company commander.'"

6.

At all times material to this cause of action, there were and are, in full force and effect the following ordinances of the City of Atlanta, which are attached hereto labeled "Exhibit A" and made a part of this petition.

7.

On September 28, 1966, plaintiffs filed with the City of Atlanta and its Board of Firemasters comprised of aforesaid documents, a Motion to Vacate and Set Aside Their Suspension and Discharge. Copy of said Motion is attached hereto labeled "Exhibit B" and made a part of this petition.

8.

On September 29, 1966, Robert L. Mitchell, Attorney for Plaintiffs, wrote a letter requesting a hearing upon said Motion to Mr. William T. Knight, Chairman, Board of Firemasters of the City of Atlanta; a copy of said letter is attached hereto labeled "Exhibit C" and made a part of this petition. There was no reply to

Mr. Mitchell's letter of September 29, 1966. On October 25, 1966, Mr. Mitchell again wrote said Mr. Knight requesting a hearing before the Board of Firemasters for its next meeting scheduled on October 31, 1966. A copy of said letter is attached labeled "Exhibit D" and made a part of this petition. On October 26, 1966, Mr. William T. Knight, Chairman of the Board of Firemasters of the City of Atlanta replied to said letter refusing to grant plaintiffs a hearing on October 31, 1966 and failed to even assure definitely a hearing on November 28, 1966, which was the next regular meeting of said Board of Firemasters. Copy of this letter is attached hereto labeled "Exhibit E" and made a part of this petition. On November 21, 1966, Mr. Mitchell again wrote Mr. Knight requesting a hearing on November 28, 1966 upon plaintiffs' Motion. A copy of said letter is attached hereto labeled "Exhibit F" and made a part of this petition. On November 25, 1966, plaintiffs were advised that their Motion was without merit in the opinion of defendants and would require no action by the Board of Firemasters, City of Atlanta. Copy of said letter is attached hereto labeled "Exhibit G" and made a part of this petition.

9.

Despite plaintiffs' numerous requests for a hearing upon said Motion, defendants have failed and refused to grant plaintiffs a hearing

or to decide said Motion. Justice delayed is justice denied.

10.

Plaintiffs' discharge is null, void, illegal, arbitrary and capricious in violation of rights as guaranteed them by the First, Fifth, Sixth and Fourteenth amendments to the United States Constitution and in violation of their rights as guaranteed them by 28 U.S.C.A. § 1343 and 42 U.S.C.A. § 1983, because plaintiffs were discharged under the following circumstances, to wit:

"A. Service of notice of the charges or accusation against these plaintiffs was not made in accordance with Section 19.14.3 (Section 12-34, Sub-Section (d)) of the Atlanta Municipal Code which provides as follows:

'(d) *Service of Notices.* Service of all notices provided for herein may be had upon any accused member in person, by the chief or any member of the department designated by the chief, or by leaving a copy of the charges or accusation of the accused at his most notorious place of abode.'

Plaintiffs show that no notice was given any of them in person by the chief or any member of the department designated by the chief, or

by leaving a copy of the charges or accusation against them at their most notorious place of abode. The suspension and discharge of these plaintiffs without service being perfected upon them of a copy of the charges or accusation against them prior to their being suspended or discharged is thus null and void.

"B. Plaintiffs show that the accusation against them was based on an alleged violation of the following rules and regulations of the Atlanta Fire Department, to wit:

Rule 3, Section 2. 'Members shall not disobey or fail to obey any order or command of his superior officer.'

Rule 6, Section 2. 'Members shall not commit any act for which they may be imprisoned or arrested whether on or off duty, in uniform or otherwise.'

Rule 8, Section 2. 'Members shall not neglect or shirk any duty.'

Rule 9, Section 2. 'Members shall not absent themselves from quarters, fire or other duty without permission of the company commander. Absent themselves from the City without notifying their company commander.'

Plaintiffs show that the foregoing rules were not in existence at the time the acts complained of occurred, at the time the charges against them were prepared and filed, or at the time plaintiffs were tried, suspended or discharged for an alleged failure to obey said nonexistent rules.

The aforesaid rules have no legal existence because they were purportedly adopted by the Board of Firemasters on May 26, 1958. Section 10.2.1 of the Charter of the City of Atlanta (Acts 1951, page 3026; Charter 1953, Section 10.10) specifically provides:

> 'Sec. 10.2.1. Authority to establish rules and regulations.
>
> The mayor and board of aldermen are given full, complete and unqualified authority to establish, and shall establish, for the department of fire, civil service rules and regulations, to the end that officers, members and employees shall serve during good behavior and efficient service, and to be promoted according to efficient service, and length of time employed in said department, all of which is to be judged of by said mayor and board of aldermen or the committee exercising its authority as aforesaid.'

Plaintiffs therefore show that there being no valid rules of the Atlanta Fire Department promulgated by the Mayor and Board of Aldermen as required by the Charter of the City of Atlanta that no legal suspension can be based upon their alleged violation.

"c. Section numbered four of the charges against plaintiffs is based upon the alleged failure to obey and comply with a valid court order issued by the Superior Court of Fulton County on September 3, 1966 thereby allegedly subjecting plaintiffs to possible contempt citation by said Court and imprisonment or arrest. Plaintiffs show that the foregoing allegation against them is not sufficient upon which to justify in whole or in part the suspension or discharge of any fireman for the following reasons:

(a) Said allegation is too vague, indefinite and uncertain in that it fails to apprise plaintiffs how, when and where they failed to obey and comply with the valid court order and subjected themselves to possible contempt citation, imprisonment or arrest.

(b) Said allegation is a mere conclusion of C. H. Hildebrand, Jr., Chief, Atlanta Fire Department not supported by the facts alleged. C. H. Hildebrand, Jr. is not a licensed Georgia lawyer and his opinions as to violations of law are worthless.

(c) Neither the Board of Firemasters nor C. H. Hildebrand, Jr., Chief, Atlanta Fire Department, has any authority or jurisdiction to determine whether any plaintiff failed to obey and comply with the valid court order issued by the Superior Court of Fulton County on September 3, 1966 thereby subjecting themselves to possible contempt citation by said Court and imprisonment or arrest. Jurisdiction over these matters and things is vested by law, and the Constitution of this State exclusively in the Superior Court of Fulton County and judges presiding therein.

(d) Plaintiffs show that as a matter of law and fact that neither they, any of them, nor the Atlanta Firefighters' Union, Incorporated has ever been served with any valid court order issued by the Superior Court of Fulton County on September 3, 1966 or thereafter for the following reasons:

(1) The petition in the subject case and the purported restraining order of Judge Luther Alverson was signed on September 3, 1966, served on J. I. Martin, individually and as President of Atlanta Firefighters' Union, Incorporated, and J. C. Freck on September 3, 1966 without process of any kind being affixed by the Clerk of the Superior Court of Fulton County, and at a time when it was a mere private paper, the same not being filed with the Clerk of said

Court until September 9, 1966. Plaintiffs had already been suspended by September 7, 1966. As a matter of law, therefore, plaintiffs at no time were ever in violation of any order of the Fulton Superior Court since it never acquired jurisdiction over them or the subject matter of the City's petition until September 9, 1966 at a time when they were already under suspension by act of the City of Atlanta.

(2) No contempt citation has ever been filed or served upon any of these plaintiffs and, therefore, as a matter of law, there could be no possibility or probability of their subjecting themselves to possible contempt citation, imprisonment or arrest.

"D. Plaintiffs show further that no legal evidence was received by the Board of Firemasters prior to their action in suspending or discharging plaintiffs and that such evidence as was received was ex parte and not under oath. The trial of plaintiffs consists in the determination of factual issues and the application of legal critera to them — a judicial act — the fundamental requirements of due process were applicable to it. Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence. Thus it is not proper to admit ex parte evidence as given by witnesses not under oath and not sub-

ject to cross-examination by the opposing party. The deciding authority may not base its decision on evidence which has not been specifically brought before it; the findings must conform to the evidence adduced at the hearing.

The Board of Firemasters having suspended and discharged plaintiffs based on a trial in which nothing but ex parte evidence was received or upon evidence not specifically brought before it and its findings not conforming to the evidence adduced at the hearing, the same is therefore null, void and in plain and literal violation of plaintiffs' right of due process as guaranteed them in Article I, Section 1, Paragraph 3; Article I, Section 1, Paragraph 4; and Article I, Section 1, Paragraph 5 of the Constitution of the State of Georgia and the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

11.

Plaintiffs aver that IVAN ALLEN, JR. met with said Board of Firemasters on several occasions outside the presence of plaintiffs prior to any hearing having been conducted upon the guilt or innocence of plaintiffs of the charges pending against them and at said meetings defendants agreed and conspired to discharge plaintiffs in violation of their legal and constitutional rights as hereinbefore alleged. After said meetings were held upon the accusations

pending against plaintiffs, the penalty of discharge, agreed upon by defendants in advance of said hearings, and in furtherance of said conspiracy, was imposed. Defendant IVAN ALLEN, JR., after said penalty was imposed, fully ratified, concurred and adopted the findings and penalty imposed by said Board of Firemasters.

12.

Each of plaintiffs has been injured and damaged on account of the illegal, unconstitutional and conspiratorial acts of defendants in the sum of $125 per week for each of them as loss of weekly salary, a total of $398,000.00 dollars, for the period September 7, 1966 through December 30, 1966. Plaintiffs' damages are increasing daily and each of them reserve the right to amend and claim all of the aforesaid damages to the time of final trial of this action.

13.

As a direct and proximate result of defendant's illegal, unconstitutional and conspiratorial acts as hereinbefore alleged, plaintiffs have been compelled to employ counsel in the person of Robert L. Mitchell, a duly licensed Georgia lawyer, and seek judgment for said attorney's reasonable fees in the premises, which

they aver to be TEN THOUSAND DOLLARS ($10,000.00).

WHEREFORE, plaintiffs pray:

a] That process and service issue and be perfected upon the defendants in the time and manner provided by law.

b] That defendants be ordered to show cause on a day certain before this court why its act and judgment in suspending and discharging plaintiffs should not be declared unconstitutional, null, void and of no force and effect and why it should not forthwith reinstate plaintiffs with all employee rights and privileges which they enjoyed with the City of Atlanta prior to the action herein complained of.

c] That defendants be temporarily and permanently enjoined from giving any force and effect to its purported action in suspending and discharging plaintiffs for the reasons hereinbefore alleged, and from interfering in any manner with plaintiffs' full enjoyment of all employee's rights and privileges which they enjoyed prior to on or about September 8, 1966 when they were suspended and discharged by the illegal, unconstitutional and conspiratorial action of the Board of Firemasters of the City of Atlanta.

d] That plaintiffs recover of and against defendants jointly and severally their reasonable attorney's fees for the prosecution of this action amounting to approximately TEN THOUSAND DOLLARS ($10,000.00).

e] That plaintiffs recover of and against defendants jointly and severally the sum of $398,000.00 dollars or such other sum as may be due them upon final trial of this action.

f] For such other and further relief as may seem meet and proper in the premises."

On June 7, 1967 Honorable Lewis R. Morgan, Judge, United States District Court, entered a written judgment denying Defendant's Motion to Dismiss, and Plaintiffs Motion for Summary Judgment, sustaining Defendant's Motion for Summary Judgment, and Dismissing this case. Judge Morgan's decision was apparently based upon the conclusions expressed in his written opinion of June 6, 1967, in which he stated as follows:

"It has been repeatedly and consistenly held that government employment is not property and that the due process clause does not apply to the holding of a government office.

"The record in the case at hand is undisputed; and no constitutional rights of the plaintiffs having been violated by the defendants, the motion of the defendants for summary judg-

ment is hereby granted, and the motion of the plaintiffs for summary judgment is denied."

Thereafter in the time and manner provided by the Federal Rules of Civil Procedure, Appellants filed their Appeal to the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals on June 18, 1968 affirmed said Order of the Trial Court without comment or discussion of the issues raised therein.

A.

The opinion of the District Court is deficient in that one of the primary positions of appellants — whether or not the rules of the Board of Firemasters were properly adopted — is never adequately discussed. Rather, the District Court disposes of the matter with the off hand comment that government employment is not property and therefore, presumably, such employment may be put to an end in any manner whatsoever. The cases relied upon by the District Court to substantiate this holding are *Jenson v. Olson*, 353 Fed. 2d 825, *Bailey v. Richardson*, 182 Fed. 2d 57, and *Birnbaum v. Trussell*, 371 Fed. 2d 672. None of these cases are applicable to the situation.

IN *BAILEY VS. RICHARDSON, SUPRA*, a decision of the United States Court of Appeals for the District of Columbia, the Court at page 51 said that the actual question presented by this case was:

> "Whether the president is faced with an inescapable dilema either to continue in government employ a person whose loyalty he reasonably suspects or else to reveal publicly the methods by which he detects disloyalty and the names of any persons who may venture to assist him."

The *BAILEY* case involved a refusal of employment to a suspected Communist and the Court held in Headnote 26 of its decision:

> "The President of the United States absent Congressional restriction, may remove from Government Service any person of whose loyalty he is not completely convinced and may do so without assigning any reason and without giving the employee any explanatory notice." Executive Order No. 9835, 3-21-47, 5 USCA 631.

The Court in making its decision, considered and upheld certain terms and provisions of the Lloyd-Lafollette Act, 5 USCA 652.

Plaintiffs in the present case are not contesting the President's authority to remove from Federal employ any person whom he has reason to suspect may have affiliations with the Communist Party.

The statutes, Executive Orders and rules and regulations applicable to Federal employment upon which the Court's decision in *BAILEY* was based have nothing to do with any of the issues in the case at bar.

In *JENSON VS. OLSON, SUPRA,* a decision of the United States Court of Appeals for the 8th Circuit, the Court said:

> "The fact of plaintiff's misconduct in office was established by State procedures. These procedures are res judicata of the issue and cannot be relitigated in the Federal Courts."

In *JENSON* the plaintiff attempted to have the United States District Court intervene and assume jurisdiction over the controversy at a time when he had already exhausted his rights of appeal through and including the highest Court of his State and certiorari had been denied by the United States Supreme Court. The Court in *JENSON* quoted certain dictum from *BAILEY* unnecessary to its decision that the case should be dismissed upon the grounds of res judicata. *JENSON* has no pertinence to plaintiffs' case.

Defendants also cited in an earlier Brief the case of *JENNINGS VS. NESTER,* 217 F. 2d 153. In *JENNINGS* a prisoner brought an action to recover damages from the State's Prosecuting Attorney after he had received a new trial on constitutional grounds. The Court held that the State's Prosecuting Attorneys had immunity under such circumstances and dismissed the case. The Court in refusing to exercise jurisdiction noted that the errors complained of by the prisoner had already been corrected in a subsequent trial.

The *Birnbaum* case does validate the dismissal of a physician, but the opinion plainly leaves open the ques-

tion presented by this appeal — whether the hearing on discharge must be held pursuant to law and due process. On page 679 in footnote 16 of the opinion in *Birnbaum* the court stated that: "appellant could be fired under state law only for incompetency or misconduct. New York Civil Service Law, Section 75." Thus a hearing was required under state law to determine whether or not there was incompetency or misconduct.

While *Birnbaum* may be used to authorize dismissal it seems clear that the decision recognizes that the hearing on dismissal must conform with applicable rules and regulations which control the administrative body. It is one thing to validate the theory that one has no right to public employment and quite another to insist that discharge from public employment may be summarily upheld without regard to valid rules properly adopted.

The charges brought against all of appellants were substantially the same and all appellants were accused of violating Section 2 of the Rules and Regulations of the Fire Department of the City of Atlanta in that Rules 3, 8.9, and 6 of said Rules and Regulations were broken. The record of the case plainly discloses that the Rules and Regulations forming the groundwork for the accusations brought against appellants were adopted by action of the Board of Firemasters on May 26, 1958, and that said rules have not been adopted or approved by the Mayor and Board of Aldermen of the City of Atlanta prior to October 5, 1966 (R. 68).

The Charter of the City of Atlanta specifically provides that the Mayor and Board of Aldermen shall have the full, complete and unqualified authority to establish all rules for the fire department (See statement of case supra). Thus, the jurisdiction in this area which the Board of Firemasters attempted to exercise is illegal and void. The record is devoid of any evidence that the Mayor and Board of Aldermen authorized the Board of Firemasters to adopt the Rules and Regulations in question and appellants strongly urge that the hearings were conducted pursuant to accusations based upon void rules and regulations. Certainly, the cases cited by the District Court do not substantiate that dismissal under these circumstances should be upheld.

B.

Appellants contend that the notice of the hearings was not properly given in that no personal service was perfected on any of appellants. The record shows and the statement of the case above sets forth that service of all notices should be made personally or by leaving copy of the charges or accusations at the most notorious place of abode of the governmental employee. It is a curious contradiction that Section 19.14.3 of the Atlanta Municipal Code which provides for such service and which section is acknowledged by all parties to be valid was not complied with nor was compliance therewith even attempted, while at the same time appellees take refuge behind the "Rules and Regulations" adopted by the Board of Firemasters. On the one hand, appellees are quick to point out that they acted pursuant

to their legal framework, while on the other they very carefully avoided making service upon appellants in the manner provided by that legal framework. The general rule relative to service of notice before administrative bodies is contained in 2 Am. Jur. 2d, Section 360, at p. 172 where it is stated that a party is entitled to notice sufficient in time and contents to enable him to prepare his defense or to meet the issues involved.

Appellants contend that their failure to appear before the hearings conducted by the Board of Firemasters was justified under the circumstances. None of the appellants were served in the manner provided by the Atlanta Municipal Code, therefore, under advice of the Union, none of appellants appeared for the hearings.

The officials of the City of Atlanta are old hands at depriving its citizens of due process. In the case of *HORNSBY VS. ALLEN*, 326 F. 2d 605, this reviewing Court set forth certain basic criteria that must be followed by officials of a municipality when performing official acts, which consist in the determination of factual issues and the application of legal criteria to them — a judicial act. In *HORNSBY* this Court said:

> "Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, see *TADANO V. MANNEY*, 169 F. 2d 665, 667 (9th Cir. 1947), which is usually equated with adequate notice and a fair hearing, see *OPP COTTON MILLS V. ADMINIS-*

TRATOR, 312 U.S. 126 (1941). Although strict adherence to the common-law rules of evidence at the hearing is not required, see *CROWELL V. BENSON*, 285 U.S. 22, 48 (1932), the parties must generally be allowed an opportunity to know the claims of the opposing party, *MORGAN V. UNITED STATES*, 304 U.S. 1 (1938), to present evidence to support their contentions, see id. at 18, and to cross-examine witnesses for the other side, *REILLY V. PINKUS*, 338 U.S. 269 (1949). Thus it is not proper to admit ex parte evidence, given by witnesses not under oath and not subject to cross-examination by the opposing party. *SOUTHERN STEVEDORING CO. V. VORIS*, 190 F. 2d 684 (1st Cir. 1929). A fortiori, the deciding authority may not base its decision on evidence which has not been specially brought before it, *UNITED STATES V. ABILENE & SO. RY.*, 265 U.S. 274 (1924); the findings must conform to the evidence adduced at the hearing, *TADANO V. MANNEY*, 160 F. 2d 665 (9th Cir. 1947). Furthermore, the Supreme Court has said that an administrative order "cannot be upheld merely because findings might have been made and consideration disclosed which would justify its order. . . . There must be a responsible finding."

An individual contesting the jurisdiction of a governing body is not required to submit to the jurisdiction of that body as a condition precedent. However, the District Court in its brief opinion summarily disposed of

these contentions with the conclusion that appellants had reasonable notice of the hearings. The dilemma of the appellants is clear: If appellants appear at the hearing, any objection to the authority of the Board of Firemasters to rule upon the accusations may be waived; on the other hand, the failure to appear might be held to be a waiver of the appellants' right to object to the authority of the Board of Firemasters, as exercised under the "Rules and Regulations".

It is submitted that the grave doubt regarding the validity of the Rules and Regulations adopted by the Firemasters is sufficient to authorize reversal of the District Court. An administrative agency does have the authority to adopt binding rules, but such rules must be properly adopted in order to bind all parties. 2 Am. Jur. 2d 350, p. 162. The basic criteria established in the *HORNSBY* case were not novel, new or unique, but were criteria long recognized and applied in other Courts. In this connection we cite the following:

U.S. VS. ZIEBER, 161 F. 2d 90

Good faith and honest intention are not sufficient to make acts of administrative body valid where they fail to comply with regulations which failure results in a denial of full and fair hearing.

BEAUREGARD VS. WINGARD, 230 F. Supp. 167

"Misuse of power, possessed by virtue of a state law and made possible only because the wrongdoer is clothed with authority of state

law, is action taken under "color of state law" within statute relating to civil action for deprivation of rights under color of any statute, ordinance, regulation, custom or usage of any state or territory. 42 USCA § 1983"

ALLA VS. U.S., 208 F. 2d 783, Cert. denied, 347 U.S. 1016

Administrative convenience or even necessity cannot override constitutional requirements of due process.

Corpus Juris Secundum, Vol. 16A, §628, pg. 852. CORPUS JURIS SECUNDUM, Vol. 16A, § 628, p. 853

". . . A judgment or order entered by an administrative board in a quasi-judicial proceeding wherein the board has denied due process to a party thereto is void . . ."

SOSNA VS. CELEBREEZZE, 234 F. 2d 289 (E. District of Pennsylvania.)

Use of extra record material by agency without notice to claimant who did not appear in person or by counsel, resulted in a denial of due process.

"Administrative agents and agencies may not take judicial notice of evidentiary material which is not a matter of common knowledge." COOK VS. CELEBREEZZE, 217 F. Supp. 366; GLENDENNING VS. RIBACOFF, 213 F. Supp. 301.

EVERETT VS. RIVERSIDE HOSE COMPANY, U. S. District Court, Southern District of New York, No. 66-1621, October 17, 1966; 63 LRRM 2455.

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that the constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrarily or discriminatory." citing WEIMAN VS. UPDERGROFF, 344 U.S. 183, 192 (1952)

CORPUS JURIS SECUNDUM, Vol. 16A, §628, p. 66

A determination based on hearsay is insufficient to satisfy the requirement of due process of law. DYER VS. WATSON, 262 P. 2d 873; 121 Cal. App. 2d 84.

U.S. VS. APPALACHIAN ELECTRIC POWER COMPANY, 107 F. 2d 769

The administrative body must reach its decision on sufficient evidence — mere receipt of hearsay, ex parte considerations or reports of others containing evidentiary matters not brought out at the hearing.

Application of Plainfield Union Water Company, 94 A 2d 673, 70 NW 267 (New Jersey)

CORPUS JURIS SECUNDUM, Vol. 16A, §628, p. 851.

"The cardinal test of the presence or ab-

sence of due process of law in an administrative proceeding is the presence or absence of the rudiments of fair play long known to the law, and whether a person has been deprived of due process of law by action of an administrative body depends on whether it acted contrary to the statutes and rules and with arbitrary discrimination."

Where administrative regulations set a higher standard of procedural due process than required by the Constitution or statute, the violation of such regulation amounts to a denial of administratively established due process of law. JEFFRIES VS. OLSEN, 121 F. Supp. 463.

TIME AND MANNER IN WHICH FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

Petitioners, in their original complaint, alleged and relied upon the Fifth and Fourteenth Amendments to the Constitution of the United States. (See Paragraph 10 of original complaint.) The Trial Judge considered the entire complaint and when it sustained respondent's Motion to Dismiss ruled that respondent's actions were not in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioners insisted upon these constitutional provisions in their Appeal to the United States Court of Appeals for the Fifth Circuit on the grounds that said judgment was contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

The United States Court of Appeals for the Fifth Circuit in its order and judgment of June 18, 1968 affirming the Trial Court's judgment held that petitioners were not denied any constitutional rights. (See Page 1 of the Court's Opinion.)

REASONS FOR GRANTING THE WRIT

1.

This case presents a question of great public importance among the several states, the question being whether, as held by the Trial Judge, "That government employment is not property and the due process clause does not apply to the holding of government office." (Page 313, certified record in this case.) The effect of this decision which stripped petitioners of their constitutional rights because they were government employees effects every employee of a city, county, state or federal government. Even the Justices of this Court are effected thereby. It is petitioners' position that they, by accepting government employment, never surrendered any of their constitutional rights and that all of said rights applied to them at the time of their discharge, which is the subject matter of the original complaint. The Trial Judge held otherwise, such holding having been affirmed by the United States Court of Appeals for the Fifth Circuit on June 18, 1968.

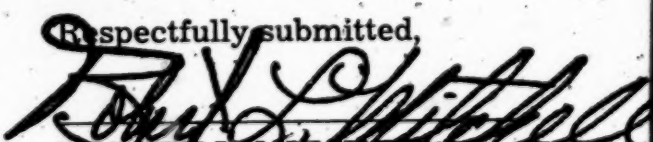
2.

The opinion of the court below is in direct conflict with a decision of the United States Court of Appeals for the Fifth Circuit in the case of *Mrs. Lola Hornsby v. Ivan Allen, Mayor of the City of Atlanta,* 326 Fed. 2d. 605.

CONCLUSION

Appellants respectfully submit that the defendants by failing and refusing to serve them with notice of time and place of their discharge hearings in the manner provided by Ordinances of the City of Atlanta, by failing to consider and make factual findings upon their Motion to Set Aside their discharges, by admitting hearsay testimony during their discharge hearings, by basing their discharge upon rules and regulations of the Atlanta Fire Department which had never been legally adopted, and by finding them guilty of charges based upon matters of which they had no jurisdiction (alleged contempt), thereby plainly denied Appellants their right of due process in the proceedings against them contrary to the provisions of the First, and Fourteenth Amendments to the United States Constitution. The conduct of defendants complained of was clearly alleged in their complaint, and in the main rests upon unrefuted testimony. The Trial Judge, therefore, plainly erred in overruling Plaintiffs' Motion for Summary Judgment, sustaining Defendants' Motion for Summary Judgment and dismissing this case. Said decision should forthwith be reversed.

Respectfully submitted,



ROBERT L. MITCHELL,
Attorney For
Jimmie R. Evans, et al,
Petitioners

1841 First Nat'l Bank Bldg.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the United States Supreme Court hereby certifies that a copy of the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT was served upon Messrs. Henry Bowden and John Dougherty, Attorneys of Record for Ivan Allen, Jr., et al, Respondents herein, by depositing a copy of same in the United States Mail, Certified, Return Receipt Requested, and otherwise franked, to their addresses of record:

MESSRS. HENRY BOWDEN AND JOHN DOUGHERTY
2614 First National Bank Building
Two Peachtree Street, N.W.
Atlanta, Georgia 30303

This 5 day of August, 1968.

ROBERT L. MITCHELL,
Attorney of Record For
JIMMIE R. EVANS, ET AL,
Petitioners

APPENDIX A

JUDGMENT

Filed: June 7, 1967

United States District Court
For The
Northern District of Georgia,
Atlanta Division

Ralph W. Allison, et al

versus Civil Action File No. 10863

Ivan Allen, Jr., W. T. Knight, Q. V. Williamson, Cecil Turner, Jack Summers and C. H. Hildebrand, Jr.

This action came on for (hearing) before the Court, Honorable Lewis R. Morgan, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, granting motion of defendants for summary judgment and denying motion of plaintiffs for summary judgment,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendants, IVAN ALLEN, JR., W. T. KNIGHT, Q. V. WILLIAMSON, CECIL TURNER, JACK SUMMERS and C. H. HILDEBRAND, JR., recover of the

plaintiffs, RALPH W. ALLISON, ET AL, their costs of action.

Dated at Atlanta, Georgia, this 7th day of June, 1967.

FILED AND ENTERED IN CLERK'S OFFICE
June 7, 1967
Claude L. Goza, Clerk
(Signed) RUTH M. STILLWELL
Deputy Clerk

CLAUDE L. GOZA
Clerk of Court
(Signed) RUTH M. STILLWELL
Deputy Clerk

(SEAL)

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25,103

JIMMIE R. EVANS, ET AL,
Appellants,

versus

IVAN ALLEN, JR., ET AL,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(June 18, 1968.)

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge.

PER CURIAM: It appearing that the appellants were not denied any constitutional rights by the actions of the Board of Firemasters, and the Aldermen of the City of Atlanta in discharging the appellants for the following charges, among others: (1) failure to obey or disobedience of an order of a superior; (2) neglect or shirking of a duty; (3) being absent without leave, we conclude that the trial court did not err in dismissing

the complaint on a motion for summary judgment. Nothing said by this court in *Hornsby v. Allen*, 5 Cir., 1964, 326 F. 2d 605, warrants any contrary determination here.

The judgment is AFFIRMED.